

**(2005) 02 MAD CK 0161****Madras High Court****Case No:** C.S. No. 218 of 1987

Bank of Cochin Ltd.

APPELLANT

Vs

Kamal and Others

RESPONDENT

**Date of Decision:** Feb. 21, 2005**Citation:** (2006) 3 BC 342**Hon'ble Judges:** R. Banumathi, J**Bench:** Single Bench**Advocate:** C. Ravichandran, for the Appellant; Badri Narayanan, for Sampathkumar Associates, for the Respondent**Judgement**

R. Banumathi, J.

The plaintiff-bank has filed this suit for recovery of a sum of Rs. 6,98,041.41 together with interest at the rate of 17.5 per cent, per annum from the date of plaint till the date of realisation and costs.

2. The suit is filed against the principal debtors-first defendant and the guarantors-defendants Nos. 2 to 4. During the pendency of the suit, the third defendant died ; his legal heirs are impleaded as D-5 to D-7.

3. The first defendant-proprietor of M/s. Blue Bay Food Exports was dealing in exports of sea foods to foreign countries. The first defendant approached the plaintiff-bank for packing credit facility. At the request of the first defendant, defendants Nos. 2 to 4 have deposited their title deeds with the intention to create equitable mortgage as security for repayment of the loan amount by the first defendant under the scheme of packing credit facility to the limit of Rs. 5,00,000 (rupees five lakhs only) on November 18, 1982. The first defendant had executed a promissory note at Madras on the same day (November 18, 1982) in favour of the plaintiff-bank for Rs. 5,00,000 repayable with interest at the rate of 12.5 per cent, per annum with quarterly rests or such rates that may be fixed by the plaintiff-bank from time to time. The first defendant had also executed a letter of continuity in

favour of the plaintiff, treating the promissory note as security for the repayment of the loan amount. On the same day, the first defendant had also executed a letter of hypothecation to secure demand cash credit. By depositing their title deeds, defendants Nos. 2 to 4 have created equitable mortgage relating to the properties set out in plaint A, B and C schedule properties. The first defendant committed default and failed to repay the advances granted thereunder in accordance with the terms and conditions agreed by him. Further, the first defendant had also clandestinely removed the hypothecated goods from the premises. The repeated demands made by the plaintiff and issuance of legal notice (dated January 30, 1984) was of no avail. The defendants are jointly and severally liable to pay the amount of Rs. 6,98,041.41 due to the plaintiff. Hence, the suit for passing personal decree against the defendants and also for passing the mortgage decree against defendants Nos. 2 to 4 relating to plaint A, B and C schedule properties.

4. Denying the averments in the plaint, defendants Nos. 1, 2 and 4 have filed their written statement raising objection on the jurisdiction of original side of this Court. According to the defendants, the plaint schedule items of properties are situated outside the jurisdiction of the original side of this Court and hence, the High Court has no jurisdiction to entertain the suit. Further, none of the defendants are liable to pay the suit claim.

5. On the above pleadings, the following issues were framed :--

(1) Whether the plaintiff is entitled for a decree for a sum of Rs. 6,98,041.41 with subsequent interest at 17.5 per cent, per annum from the date of the suit till the date of realisation ?

(2) Whether the plaintiff is entitled for a preliminary mortgage decree as prayed for in the plaint ?

(3) To what relief, the plaintiff is entitled for ?

Issues Nos. 1 to 4 :

6. Originally, Bank of Cochin granted packing credit facility to the first defendant. The Bank of Cochin went into liquidation and subsequently was amalgamated with State Bank of India as per the direction of the Reserve Bank of India. The suit transaction was transferred to Anna Salai branch of State Bank of India. The expression "plaintiff-bank" hereinafter denotes the "State Bank of India", with which the erstwhile Bank of Cochin was amalgamated.

7. The first defendant--Kamal was the proprietor of M/s. Blue Bay Food Exports. The first defendant was engaged in purchasing prawns from fishermen and wholesalers for being exported to other countries. During 1982, the first defendant approached the plaintiff-bank for packing cash credit facility for the purpose of sea food export. The first defendant was granted ad hoc facility, pending granting of regular finance facility. From the evidence of P. W. 1, it is made clear that D-I was granted ad hoc

facility and regular cash credit facility on the equitable mortgage created by defendants Nos. 2 to 4. At the time of granting ad hoc finance facility, followed by regular finance facility granted in November 1982, defendants Nos. 2 to 4 have deposited their original title deeds and executed memorandum of agreements (dated August 26, 1982 ; August 26, 1982 ; August 7, 1982, respectively) affirming their intention to create equitable mortgage. On such security/deposit of title deeds, intending to create equitable mortgage by defendants Nos. 2 to 4, regular packing cash credit facility was granted to the first defendant on November 18, 1982, to the extent of Rs. 5,00,000.

8. To secure the regular packing credit facility, the first defendant had executed exhibit P10--promissory note dated November 18, 1982. The first defendant had also executed exhibit P11--packing credit agreement. Exhibit P12 is the letter of continuity executed by the first defendant undertaking to repay balance of the amount. The first defendant had hypothecated the goods--marine products by executing exhibit P13--letter of hypothecation. Under exhibit P13, the first defendant had hypothecated the goods as noted below :

"All tangible movable property such as products, stock-in-trade and goods of the borrowers which now or hereafter from time to time during this security shall be brought in, stored or be in or about the premises or godowns of the borrowers at Madras or anywhere else comprising all sorts of marine products."

9. The first defendant was not regular in repayment of the loan/advance availed of by him under packing credit facility. After repeated demands, the plaintiff-company issued exhibit P14--legal notice (dated January 30, 1984) calling upon defendants Nos. 1 to 4 to pay the outstanding amount due and the interest. There could be no denying that the first defendant was granted packing cash credit facility to the tune of Rs. 5,00,000. In fact, in exhibit P15--reply notice, the first defendant had not denied availing of packing cash credit facility. In exhibit P15--reply notice, the first defendant had only stated that the loan amount advanced by the plaintiff-bank was used for advancing cash to various fishermen and wholesalers over the coastal area of Tamil Nadu and Andhra Pradesh. In exhibit P15, the first defendant had further stated that because of the power cut and want of proper power, the goods kept in the cold storage got deteriorated and that he had great difficulty to continue the cold storage and damaged stocks could not be exported. Further, in exhibit P15--reply notice, the first defendant has pleaded that there had been automatic expiry of the loan facility and that the first defendant is not liable to pay the amount, which he has availed from the plaintiff-bank. The contentions raised in exhibit P15--reply is untenable. As noted earlier, under exhibit P13--letter of hypothecation--the first defendant had hypothecated the goods which are stored only at the borrowers" risk. Clause 5 of exhibit P13 reads as follows :

"That the hypothecated goods shall be stored or kept at the borrowers" risk and expense in good condition and shall be fully insured with some insurance office or

offices approved by the bank against loss of damage by fire, and if required by the bank against loss or damage by riot and civil commotion."

10. When the goods were stored or kept at the borrowers" risk, the first defendant cannot seek exoneration of his liability on the ground of deterioration of the goods and his inability to maintain the cold storage due to power cut.

11. Perhaps, realising the weakness of that plea, the first defendant has not set forth that plea in the written statement. In the written statement, there is only vague denial of liability of the defendants. Jurisdiction of the original side of this Court is the main contention raised by the defendants in paragraph (3) of the written statement. No other plea either regarding creation of equitable mortgage or such other contention is raised. Before advertting to the contentions raised relating to "intention to create equitable mortgage", we may firstly refer to the defence set forth in the written statement--on the maintainability of the suit on the original side of this Court.

12. Plaintiff A and B schedule properties relate to the plots in Pallavaram. Plaintiff C schedule property relates to Kollapuram, within the Sub-Registrar Office of Peralam. Pointing out that the suit immovable properties are not situated within the original jurisdiction of this Court, in the written statement, objection is raised that the suit immovable properties are situated outside the jurisdiction of the court and that none of the defendants are residing or carrying on business within the jurisdiction of original side of this hon"ble court. This contention does not merit acceptance in view of the decision in Southern Petrochemical Industries Corporation Ltd. Vs. Durga Iron Works and Others, wherein a Division Bench of this Court has held :

"... such mortgage suits cannot come under the term "suits for land or other immovable property" spoken to in Clause 12 of the Letters Patent...."

13. The above decision was referred to by a Division Bench of this Court Central Bank of India Vs. Joseph and Others, with approval. Pointing out that cause of action has partly arisen within the High Court's territorial limits, though mortgaged properties were situated outside territorial jurisdiction of original side of this Court, the Division Bench has held that mortgage suit is maintainable in the High Court and that such suits cannot be transferred to city civil court from original side of the High Court because of enhancement of pecuniary jurisdiction of the city civil court.

14. In this case also, part of the cause of action, viz., advancing packing cash credit facility and execution of documents arose in Chennai--within the local limits of ordinary original jurisdiction of the High Court. Though the mortgaged properties are situated outside territorial jurisdiction of original side of the High Court, no objection could be taken as to the maintainability of the suit within the jurisdiction of this Court. This is all the more so, when "leave to sue" has already been granted by this Court to institute the suit. The defence raised by the defendants in para. (3) of the written statement on the maintainability of the suit does not merit

acceptance.

15. Defendants Nos. 2 to 4 are the guarantors. By depositing their title deeds, defendants Nos. 2 to 4 have created equitable mortgage relating to plaint A, B and C schedule properties. The officer of the plaintiff-bank--P. W. 1 has clearly spoken about the deposit of original title deeds by defendants Nos. 2 to 4 in respect of plaint A, B and C schedule properties with intention to create equitable mortgage in favour of the plaintiff-bank.

16. The defendants are related to each other as noted below :

Hathija Ammal  
(D-4)  
|  
| ----- |  
Kamal Hameetha Beevi (D-2)  
(plaintiff) Hassain Khuddus (D-3)  
(died)  
|  
| ----- | ----- |  
Faxlur Rahman (D-5) Afrid Ahmed Asmik Ahmed  
(D.W.1) (D-6) (D-7)

17. The details of the documents relating to equitable mortgage by defendants Nos. 2 to 4 could be detailed as under :

	Properties over which equitable mortgage was created	Documents of title	Memorandum of equitable mort and date
D-2	Plaint A Schedule Property -- Pallavaram-- Old S. No. 57/1-- Extent 2880 sq. ft.	Exhibit P3-- sale deed dated 28-8-1980	Exhibit P4--
D-3	Plaint B Schedule Property --Pallavaram -- S. No. 407-4 grounds and 1500 sq. ft.	Exhibit P5-- Settlement deed dated 11-9-1980	Exhibit P6-- 20
D-4	Plaint C Schedule Property--Kollapuram --S. No. 67/16 Tiled House	Exhibit P8 -- Compromise memo in O.S. No. 10 of 1945 on the file of District Munsif Court, Mayavaram	Exhibit P9-- 7

18. As said earlier, the first defendant was granted regular packing credit facility on November 18, 1982. Defendants Nos. 2 to 4 are said to have deposited the above title deeds and creating equitable mortgage under exhibits P6 and P9 respectively even in the month of August 1982, much prior to the sanction of packing credit facility. Pointing out that granting of loan and creating equitable mortgage are not simultaneous or contemporaneous, on behalf of the defendants, it is contended that the defendants could have had no intention to create equitable mortgage to secure the loan facility to the first defendant. It is submitted that the plaintiff-bank had only collected the documents from the first defendant and on the signatures obtained from the other defendants, the plaintiff-bank has set up the plea of deposit of title deeds and creating equitable mortgage. Submitting that memorandum of deposit of title deeds and the loan transaction are not simultaneous, learned counsel for the defendants contended that the defendants could have had no intention to create the equitable mortgage. It is mainly submitted that in August, 1982, there was no existing debt from the first defendant or that the regular packing credit facility was not granted to him and that defendants Nos. 2 to 4 could not have any intention to secure the debt which was not in existence in August, 1982. In this regard, learned counsel for the defendants has relied upon the decision reported in [Rachpal Mahraj Vs. Bhagwandas Daruka and Others](#) .

19. In the light of the contentions advanced by the defendants, the following two crucial questions arise for determination :

(1) Did the parties intend to create equitable mortgage by deposit of their title deeds ?

(2) Since the deposit of title deeds and the memorandum of agreement for deposit of title deeds are earlier in the month of August, 1982, can the contention of the defendants that they are not simultaneous and that they do not form part of the loan transaction is acceptable ?

20. Even at the outset, it is to be pointed out that the plea relating to "absence of intention to create equitable mortgage" was not at all raised in the written statement. The only defence set forth in the written statement was regarding the jurisdiction of the original side of the High Court. Since there was no pleading on this aspect, no issue was framed relating to the intention or otherwise to create equitable mortgage. Had the defendants raised that plea in the written statement, the plaintiff-bank would have had the opportunity of explaining the same. Only during the cross-examination of P. W. 1, he was elaborately cross-examined regarding the deposit of title deeds by defendants Nos. 2 to 4. In fact, there was no specific suggestion to P. W. 1 denying the intention of defendants Nos. 2 to 4 to create equitable mortgage. In exhibit P15 reply notice, the first defendant has denied "creation of equitable mortgage". In exhibit P15, the first defendant has stated that the first defendant has never handed over any document for the purpose of creating the mortgage. But, the documents were delivered only to find

out the capacity, status and the financial position of the first defendant. The first defendant had thus denied the creation of equitable mortgage in the presuit reply notice. But, no such plea was raised in the written statement. Absence of plea in the written statement considerably weakens the defence. Though defendants Nos. 1, 2 and 4 have filed their written statements, none of them got into the witness box. The fifth defendant--Faslur Rahman, son of deceased--third defendant was examined as D. W. 1. Admittedly, D. W. 1 was born in the year 1976. At the time of loan transaction in 1982, D. W. 1 must have been aged only six years. D. W. 1 was so young to have any personal knowledge about the loan transaction. Fairly, D.W. 1 had also admitted that he has no personal knowledge about the loan transaction by his maternal uncle--the first defendant. Under such circumstance of non-raising of the plea in the written statement and non-examination of defendants Nos. 1, 2 and 4, the contention raised denying the creation of equitable mortgage does not carry any weight.

21. Since much arguments was advanced by learned counsel for the defendants, though no issue was framed, in the light of the above questions formulated in para. (17), it is to be determined whether the documents--exhibited P3, P5, P7 and P8 were deposited by defendants Nos. 2 to 4 for the purpose of creating equitable mortgage over plaint A, B and C schedule properties.

22. In order to prove the existence of an equitable mortgage, the following requisites are necessary :

- (1) a debt;
- (2) a deposit of title deeds ; and

(3) an intention that the deeds shall be security for the debt. In so far as deposit of title deeds is concerned, there is not only physical delivery of documents of title, but also the same is followed by execution of memorandum of agreement, affirming the intention of defendants Nos. 2 to 4 to create equitable mortgage to secure the packing cash credit facility from the branch or which may be availed of at any time in future from the plaintiff-bank. For appreciating the manifestation and the intention of defendants Nos. 2 to 4, we may usefully refer to the contents of exhibits P4, P6 and P9, which is as follows :

"Following are the documents of title which I have already handed over to you, intending as security for the advance already availed of by M/s. Blue Bay Food Exports, from your branch or which may be availed of at any time in future from your branch or from any of your branches."

23. The circumstances--(i) handing over of documents ; (ii) that the parties have expressed that the documents are being handed over intending as security for the advance already availed or which may be availed at any time in future leads to the definite conclusion that the defendants had the intention to create equitable

mortgage relating to plaint A, B and C schedule properties.

24. Packing credit facility was granted to the first respondent in November 1982. In security for the credit facility, the first defendant had executed promissory note exhibit P10 and other related documents on November 18, 1982. The documents of title were deposited by defendants Nos. 2 to 4 under exhibits P4, P6 and P9--memorandum creating equitable mortgage even in August, 1982. P. W. 1 has stated that defendants Nos. 2 to 4 have given security at the time of giving ad hoc facility and also the regular finance facility. As noted earlier, the first defendant availed of packing credit facility for export of sea foods--marine products. Amount has to be advanced to the fishermen and wholesalers for purchase of prawns. Quite probably for advancing that amount before granting regular credit facility, ad hoc loan facility must have been granted to the first defendant. On being satisfied with the credentials of the security, i.e., the equitable mortgage created by defendants Nos. 2 to 4, the first defendant was granted regular packing credit facility. Any system of lending particularly cash credit loan must operate conveniently both to the bank and to the customers. Amount was required by the first defendant for advancing loan to the fishermen and wholesalers for purchase of prawns to be exported; while the bank needed sufficient security for advancing the loan amount to the limit of Rs. 5,00,000. The advancing of the amount for purchase of prawns was on the basis of trade and seasonal industries. Quite naturally to enable the first defendant, the plaintiff-bank must have advanced the money on ad hoc loan facility. The circumstance that deposit of deeds and grant of regular cash credit facility, are not simultaneous does not lead to the conclusion that they are not integral part of the loan transaction. The contention that by handing over the title deeds in August, 1982, the parties had no intention to create equitable mortgage does not merit acceptance. Defendants Nos. 2 to 4 have delivered their documents of title with intention to create security for the ad hoc loan facility and also the regular finance facility. It is to be pointed out that had the plea been raised in the written statement, the plaintiff-bank would have explained the same. The evidence of P. W. 1 and the materials on record clearly shows that the equitable mortgage had been created by defendants Nos. 2 to 4 "...for the advance already availed of by D-1... or which may be availed at any time in future ..." The arguments advanced by the defendants is liable to be rejected.

25. From exhibit P9--statement of accounts and from the evidence of P. W. 1, it is clear that the amount of Rs. 6,98,041.41 is due from the defendants, which amount defendants Nos. 1 to 7 are jointly and severally liable to pay to the bank with interest at the rate of 17.5 per cent, per annum from the date of suit till the date of realisation. A mortgage decree for sale of plaint A, B and C schedule properties is also to be passed. It is made clear that there is no personal decree against D-5 to D-7, who are the legal heirs of D-3.

26. Therefore, the suit is decreed with costs as prayed for. It is held that defendants Nos. 1 to 7 are jointly and severally liable to pay a sum of Rs. 6,98,041.41 with interest at the rate of 17.5 per cent, per annum from the date of suit till the date of realisation and costs. Mortgage decree for the sale of plaint A, B and C schedule properties is also passed. However, there is no personal decree against D-5 to D-7. Time for payment three months.